

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

AARON HANSEN, ET AL	§ CASE NO. 2:13-CV-00242
VERSUS	§ CORPUS CHRISTI, TEXAS
	§ MONDAY,
	§ MARCH 17, 2014
TOTAL SCREEN SOLUTIONS, INC.,	§
ET AL	§ 9:00 A.M. TO 10:09 A.M.

STATUS CONFERENCE

BEFORE THE HONORABLE NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE Plaintiff:	SEE NEXT PAGE
FOR THE Defendant:	SEE NEXT PAGE
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1 HOUSTON, TEXAS; MONDAY, MARCH 17, 2014; 9:00 A.M.

2 THE COURT: The Court calls Cause Number C-13-242,
3 Hansen, et al versus Total Screen Solutions, Inc., et al. If
4 the Plaintiff will announce?

5 MR. MOULTON: David Moulton for the Plaintiffs.

6 MR. PIPITONE: Your Honor, I'm Dan Pipitone, and my
7 partner, Annette Idalski, for the Defendants.

8 THE COURT: All right. We're here on several
9 matters, and I guess first was Mr. Hansen found?

10 MR. MOULTON: Your Honor, I received an email from
11 him a couple of weeks ago. He indicated that he is working
12 out of the country and won't be back until September. He
13 said -- he requested that I -- we've taken on the case. He
14 didn't say anything more. I tried to get more information out
15 of him and he didn't respond.

16 THE COURT: Okay. So you're going to dismiss him?

17 MR. MOULTON: Right. We were proposing dismissal --
18 we discussed it with the defense, we're proposing dismissal
19 without prejudice. They didn't agree to the without prejudice
20 part.

21 MR. PIPITONE: And that's correct, Your Honor. I
22 think at this stage with Mr. Hansen not being a participant
23 ever since he initiated the suit. He really hasn't been
24 active at all, and at this point I think that we would like to
25 have it with prejudice. To make it without prejudice merely

1 gives him another extension of the time he's already received
2 to participate.

3 THE COURT: The Court is going to grant the
4 dismissal without prejudice, but then that does affect -- he's
5 the lead -- well, you have two, you have Lauterbach also.

6 MR. PIPITONE: Yes, Your Honor.

7 THE COURT: Well, we'll get to that in a minute on
8 the certification. But --

9 MR. PIPITONE: Your Honor --

10 THE COURT: Go ahead.

11 MR. PIPITONE: -- if I might, please --

12 THE COURT: Yes.

13 MR. PIPITONE: -- we have a case out of the Middle
14 District -- excuse me, out of the District of Maryland. It's
15 an unpublished opinion with facts that are very similar to
16 this.

17 THE COURT: Like where one of the main Plaintiffs is
18 dismissed, or what --

19 MR. PIPITONE: Where the Plaintiff -- no, it's not a
20 collective action, but it is an employment related matter.
21 And in that case, very similar circumstances to this, the
22 Plaintiff indicated that she did not want to participate, she
23 was "stressed out", and the Plaintiff's attorney tried to
24 dismiss it without prejudice and the Court dismissed it with
25 prejudice.

1 And I have a copy of that case for Your Honor's
2 consideration, but that's why we're pressing for the dismissal
3 with prejudice, based on *Hood* case out of the District of
4 Maryland.

5 THE COURT: I'll look at it and if I think I need to
6 reconsider, I will, but --

7 Have you had a chance to look at that case?

8 MR. MOULTON: No, Your Honor.

9 MR. PIPITONE: No, we haven't.

10 THE COURT: Either way.

11 MR. MOULTON: Whichever order.

12 MR. PIPITONE: If I may pass this up, Your Honor?

13 THE COURT: Yes. So I mean what was the situation
14 here, were they pretty far along into the case or?

15 MR. PIPITONE: They were along into the case, Your
16 Honor. The Plaintiff had initiated a suit, but had not
17 participated in discovery. There has been a motion to compel
18 discovery just as we had here, Your Honor. And then at that
19 point the Plaintiff's attorney received a communication from
20 the Plaintiff to the effect that she was overly stressed about
21 the lawsuit and did not want to participate.

22 The lawyer asked -- but she did not state whether
23 she wanted it with or without prejudice, she's a layperson,
24 probably didn't know the difference. Similarly with
25 Mr. Hansen here probably doesn't know the difference either.

1 But in that case the attorney for the Plaintiff, Ms. Hood,
2 asked for a dismissal without prejudice and the Court said,
3 No, we've gone along actively for some times now, the
4 Defendant has been very involved, has spent exorbitant sums of
5 money in the defense, such as we have here.

6 THE COURT: But you're going to -- we're -- this
7 action's going to continue, right, anyway, I guess is what I'm
8 saying. You would have had to have done whatever you've done
9 anyway.

10 MR. PIPITONE: That is true, Your Honor. That is
11 true. But see, Mr. Hansen has not done anything other than
12 arguably initiated a lawsuit he has never participated in any
13 way, either through answering written discovery, presenting
14 himself for the conduct of his deposition, responding to the
15 motion to compel in any way, other than through Mr. Moulton,
16 who didn't really have instructions until just recently, and
17 those instructions, Your Honor, were, I want out of the suit.

18 Now what we've asked Mr. Moulton to do as well -- we
19 obviously have seen the email, but we've asked him to bring
20 the email with him for *in camera* inspection by Your Honor.
21 And there may be more instructions in it than I'm aware of,
22 but I obviously can't argue about something that I don't know.

23 THE COURT: I guess the situation here in *Hood*, this
24 was a one-Plaintiff situation, it looks like the Defendant had
25 spent significant time and effort and resources in litigating

1 the Plaintiff's action, which is a little bit different than
2 what is before the Court. I think the Defendant would have to
3 have taken the actions they've taken already. This case in
4 *Hood* looks like it was nearing the end of discovery
5 approaching pretrial stages, which we're nowhere near. And
6 the Court found that the late stage of the action favored
7 dismissal with prejudice.

8 I think it's kind of different than what we have
9 before us.

10 MR. PIPITONE: Then, Your Honor, if I may request --
11 and I understand what you said -- if Your Honor would take an
12 *in camera* inspection of that email, it may contain
13 instructions that say, I don't want to participate, I never
14 want to participate, I'm sorry I even joined the suit. I
15 don't know. But it would comfort me and my clients to some
16 extent if Your Honor would take a look at that email.

17 THE COURT: Mr. Moulton?

18 MR. MOULTON: Your Honor, I have it available on the
19 phone. He said that he's working in a foreign country --

20 THE COURT: Do you mind if I look at it?

21 MR. MOULTON: Okay. Certainly. And I'll put it out
22 there's a couple of other -- while I'm pulling it up here -- I
23 think there's some other differences in the case that are --
24 that we should consider. Him being out of the country makes
25 it difficult, if not impossible to be involved in the case

1 anyway. It's not really his fault. The other part of this is
2 that we have multiple instances now where Total Screen
3 Solutions has reached out, or threatened, or coerced people
4 about participation in the lawsuit.

5 We have the email that we just filed on Friday where
6 we just -- or on Thursday -- Friday I think it was -- no,
7 Thursday we filed it -- with regards to Lauterbach getting
8 fired from Tri C (phonetic), the owner of the company, and
9 Total Screen Solutions heard his daughter, Brandy Burleson,
10 sent an email to another Plaintiff in the case that says that
11 she couldn't keep Lauterbach employed because he sued her
12 daddy.

13 We have another declaration from Plaintiff Silva
14 that we filed about how Total Screen Solutions is looking to
15 make sure he never got a job in the oilfield again. Plaintiff
16 Lauterbach has also received that threat. Plaintiff Hansen
17 also was threatened that if he came back -- ever came back to
18 Corpus, that Total Screen Solutions would kick the shit out of
19 him. So with these sorts of threats out there, I think it --
20 we're not -- we can't be 100 percent sure is Hansen's decision
21 is completely voluntary.

22 Now I'll pull his email so you can look at it.

23 MR. PIPITONE: Your Honor, while Mr. Moulton finds
24 that email for presentation to the Court, I don't want to
25 grace his comments with too much of a response, but with

1 respect to the Plaintiff, Hansen, there is absolutely nothing
2 of record one way or the other about any harassment tactics by
3 the Defendants.

4 And while I'm sure it is distasteful for Mr. Moulton
5 to bring up such allegations that are unsubstantiated, just as
6 it would be distasteful for me to bring up the possibility
7 that Mr. Hansen never wanted to be in this suit and was
8 influenced from outside sources to begin it in the first
9 place.

10 So I really don't want to dignify this harassment
11 and intimidation and the crass language with much more of a
12 response. But I don't want it to be left unresponded to
13 either.

14 THE COURT: Okay.

15 MR. MOULTON: Your Honor, I have my email to him and
16 the response and another email to him that's gone unresponded
17 to. If I may approach?

18 THE COURT: Yes.

19 MR. MOULTON: His email is the one with the gray A.

20 (Pause in proceedings.)

21 THE COURT: All right. The Court's dismissing the
22 case without prejudice.

23 MR. MOULTON: Thank you, Your Honor.

24 THE COURT: And that should then moot -- that motion
25 to compel only involved Hansen. Is that correct? That was

1 pending?

2 MS. IDALSKI: Yes, Your Honor.

3 THE COURT: So that DE 47 then is moot at this
4 point?

5 MR. MOULTON: It is, Your Honor.

6 THE COURT: Then there is the -- what does that do
7 to the motion to certify? Did Hansen -- was he the one that
8 provided information regarding similarly situated --

9 MR. MOULTON: No, Your Honor, we could never contact
10 him to get his declaration. We have a declaration from
11 Mr. Lauterbach, the other named Plaintiff, and we have
12 declarations from four opt-ins, so for a total of five
13 declarations.

14 THE COURT: Okay. I guess let's address motion to
15 quash the subpoenas next, and then we'll address the
16 certification.

17 MR. MOULTON: Okay. Would you like me to start,
18 Your Honor?

19 THE COURT: Yes.

20 MR. MOULTON: Okay. So Total Screen Solutions has
21 issued, or is attempting to issue subpoenas to three prior
22 employers of Plaintiff, James Lauterbach. The scope of their
23 subpoenas to the employers is extremely broad, does not
24 exclude anything about their employment -- about his
25 employment. It goes back to jobs he's had as far back as

1 1992. They ask for everything possible under the sun.

2 He basically worked in the oilfield from about 1992
3 to about 2007, and then from about 2008-2010 he was
4 unemployed, and then started working for Total Screen
5 Solutions. So any of these employers that they're seeking
6 information on are already three years before even this
7 lawsuit starts.

8 And, you know, whether or not he was terminated,
9 whether or not he was written up, whether or not he was paid
10 by the hour, whether or not he had benefits or was classified
11 as a 1099 employee or a W-2 employee, none of those things are
12 going to impact whether or not he's an independent contractor
13 with TSS, which is the issue in this case. The number of
14 hours he worked for these prior employers won't have any
15 affect -- well, won't have any bearing on the number of hours
16 he had worked for Total Screen Solutions.

17 And it'll also harm Mr. Lauterbach because he's
18 seeking employment with these companies, he networks with
19 them, he calls these people up. He is interviewing with one
20 of them, he is applying with another, another one he's called
21 and they said they don't have work right now, but, you know,
22 he's continuing contact with them. And so if they get the
23 burdensome subpoena and have to spend time and resources
24 answering all these questions about him, and also being
25 notified of the fact that he is suing Total Screen Solutions,

1 it has a, you know, chilling effect on his ability to get
2 employment.

3 The other subpoena that Total Screen Solutions has
4 is for his cell phone records going back, you know, to January
5 2010 to -- until AT&T answers it, and he's only worked there
6 from June 2010 to May 2013. And it's everything. I mean
7 there's no restriction as to certain calls or certain times.

8 So every call he made when he's not working, every
9 call he made to an attorney, and he has -- he's not the --
10 this is not the only legal matter he's in. Every call he's
11 made to somebody he's networking to for employment. They will
12 all be in these records, and Total Screen Solutions only has
13 to run those numbers through a simple database to find out
14 everything about the people he's called. And it's just
15 totally irrelevant. I mean whether or not he calls somebody
16 on a weekend or on a day off, that has nothing to do with the
17 case.

18 Total Screen Solutions says that they need those
19 records to prove that -- you know, when he's working. Well,
20 the problem with the phone records is that they're not going
21 to be a substitute for the time records that Total Screen
22 Solutions is required to keep under the Fair Labor Standards
23 Act. They're supposed to know when he was working.

24 And if he has a phone call, even when he says he's
25 supposed to be working, it doesn't say -- it doesn't tell us

1 if he did it on a break, it doesn't tell us if he did the
2 phone while -- you know, he's on the phone while he was
3 monitoring equipment or doing some other passive activity.
4 You know, it doesn't -- it's not going to be a reliable
5 indicator of when he worked.

6 It's not going to be a reliable indicator of where
7 he was either. The other reason that they say they needed it
8 is because they can -- you know, they want to somehow use it
9 to prove that if he's maybe not on the job site when he said
10 he would be.

11 The problem with cell phone records in that regard
12 is that they pick up signals or they -- you know, it's just
13 the nearest tower it picks up, and so they can pick up towers
14 45 miles away. So he's out on a rig in a remote spot and he
15 makes a phone call, and that phone call happens to get
16 registered in a town 45 miles away because that's where the
17 cell phone tower is, it's going to make him look like he was
18 there when he was not.

19 You know, it's just it's not going to be a reliable
20 way to piece together time records that they didn't keep.

21 THE COURT: Okay.

22 MR. PIPITONE: I'd like to --

23 THE COURT: Yes.

24 MR. PIPITONE: -- defer to Ms. Idalski.

25 MS. IDALSKI: Your Honor, there's a lot of

1 speculation with no evidence here. So, you know, I'm going to
2 need to point out some of these things because Mr. Moulton
3 keeps saying that the Plaintiff, Mr. Lauterbach, is going to
4 be harmed because he's applying with these employers. Okay.
5 So first let me address the harm.

6 There is no harm. He's not applied with any of
7 these employers. And, in fact, one -- there's -- we're
8 talking about three. We're only talking about three
9 subpoenas, one of them is gray -- let me get the correct name
10 here -- Gray Wolf Drilling. He testified in his deposition
11 last week that he failed a drug test and was fired from that
12 company. He's already ruined his reputation with that
13 company. He's not applying for a job with that company.

14 So first of all, this man is not out there applying
15 for jobs.

16 THE COURT: When did he work there?

17 MS. IDALSKI: He worked there 1998 through -- it
18 looks like 2002. Let me explain why we want the records.

19 THE COURT: Just tell me again, who are the other
20 two?

21 MS. IDALSKI: Sure.

22 THE COURT: Gray Wolf --

23 MS. IDALSKI: One is Nabors, one is Gray Wolf and
24 the other is Thornton Drilling. And I'll give you the dates,
25 Your Honor, pursuant to the Plaintiff's deposition. He says

1 that he worked at Thornton Drilling from 2003 to 2007. And
2 with respect to Nabors, he worked there at two different
3 times, 2000-2001, and he couldn't recall the date of the other
4 time he worked there.

5 So Plaintiff has to be able to show some type of
6 harm. Okay. There is no harm with requesting these subpoenas
7 and these companies finding out that Mr. Lauterbach has a
8 lawsuit. That is not showing harm. The Plaintiff has the
9 burden to show that they're not relevant. Okay. We have
10 shown that they're relevant, that they will lead to the
11 likelihood of admissible evidence, of discoverable evidence.

12 We've shown this because -- we've shown the Court
13 the *Gate Guard Services* case, and in that case Judge Rainey
14 specifically said that this information goes to the profit and
15 loss factor. So whether a worker can increase their profits
16 by taking other jobs is highly relevant to this factor.

17 We need to know about Mr. Lauterbach's employment
18 before he was working at TSS, during the time he was working
19 at TSS and taking breaks in between jobs. We only know about
20 three employers. We've only sent out three subpoenas. We
21 want applications, we want dates of employment and we want to
22 know when he worked at these employers, whether he applied,
23 whether he tried to get a job there, because if he did, it
24 shows that he could have earned a profit or suffered a loss
25 during the time he had these projects with our client.

1 So there's a case on point which says that this
2 information is relevant. And the Plaintiff hasn't shown that
3 there's any harm in doing so. How could there be harm --

4 THE COURT: It just seems overly broad. You're
5 asking for training records, disciplinary records, I mean
6 you're going beyond, you know, when he worked, how much he
7 worked, was he working there while he was working for your
8 company.

9 MS. IDALSKI: Your Honor, the -- let me address one
10 other part of this. The other factor, as you know, for the
11 independent contractor test, is the skill and initiative
12 factor. And so we have to show -- or our argument is going to
13 be that these individuals for some of these jobs were skilled,
14 so we have to show -- if they say, No, we weren't skilled, we
15 didn't know anything, this job was simple. But, in fact, they
16 were skilled.

17 And during Mr. Lauterbach's deposition he goes into
18 great detail about all of the things he learned over the years
19 and how he worked himself up the ladder and how he understood
20 how the rig process works. So that's why we want training
21 records. We want to what his job duties are, we want to know
22 what he did.

23 Those are the things that we're looking for that are
24 directly relevant to the case. If the Court wants us to
25 narrow the subpoena, we'll narrow it the subpoena, but there's

1 no harm here.

2 THE COURT: All right. You want to address the
3 phone records?

4 MS. IDALSKI: Pardon me?

5 THE COURT: Do you want to address the --

6 MS. IDALSKI: Oh, sure.

7 THE COURT: -- phone records?

8 MS. IDALSKI: With respect to the phone records,
9 it's the same thing. I mean the phone records are -- again,
10 where is the harm. I mean we request phone records in every
11 employment case that's filed. I mean the Defendant has the
12 right to conduct discovery.

13 Here, this Plaintiff, unlike the other potential
14 punitive class action members, are -- is saying that he worked
15 all the time. He worked 70 hours a week, he worked, you know,
16 three days straight, he worked all the time. So he also
17 claims, you know, that he called certain people on the job,
18 and we have the right to verify what he was doing, where he
19 was working.

20 We're not going to take the time to skip trace his
21 telephone records. We don't care about his personal
22 information.

23 THE COURT: So what is it you want? Why can't you
24 narrow it then?

25 MS. IDALSKI: Well, we -- you know what, we can

1 narrow it, and we agreed to narrow it to the dates of his
2 employment with TSS, which I believe is 2010 to 2013. So we
3 can certainly narrow it within that time frame. We're not
4 going to get text messages, Your Honor, because we can -- the
5 companies just don't save text messages, so we've said, That's
6 fine, we don't need text messages.

7 But we do want to know if he was working somewhere
8 else, we do want to know if he was on the phone and in -- by
9 area code if he was in other areas other than where he was
10 supposed to be. Those things --

11 THE COURT: Okay. Getting the phone records, how is
12 that going to tell you he was working somewhere else?

13 MS. IDALSKI: Well, if he's in different -- various
14 area codes, Your Honor, if he's on the phone for, you know,
15 lengthy periods of time. We will match up the telephone
16 numbers of the employers that we do know to see if he was
17 working for those individuals. I mean it could potentially
18 show -- it could lead to the discovery of admissible evidence.

19 We have to be able to do discovery on whether or not
20 this man was working as many hours as he says he was working.
21 We have the right to test that. And he's already -- he's got
22 a lapse in memory, or perhaps at worst even some dishonesty
23 with respect to his criminal record. So, you know, these
24 records are going to show us, and verify some of his
25 statements. And it does go to his credibility.

1 Now if it comes to the point where Mr. Moulton wants
2 to file a motion in limine if this thing gets that far, then
3 he can do so. But right now we're in the discovery period and
4 where is the harm to this man?

5 THE COURT: Okay. Any final comments?

6 MR. MOULTON: Yes, Your Honor. Back to the employer
7 subpoena, she -- his deposition testimony was not -- has to be
8 clear on exact dates, and it also -- he wasn't -- you know, it
9 kind of -- depending on where you look in the transcript, you
10 get kind of a different feel for this. But the -- it's true
11 that he said at one point that he did not apply with Gray
12 Wolf, but later he says that he had called Gray Wolf and they
13 weren't hiring. And so he's in contact with them.

14 Fortin (phonetic), he has actually gone to a -- you
15 know, he's actually done an interview with them. Nabors, he's
16 been in -- he's also contacted, and they're at these job fairs
17 that he's going to and that he's trying to get employment with
18 them. So these are employers that he does have an interest
19 with still.

20 Now whether or not he worked for them in 2002, 2007,
21 1992, that has nothing to do with this case. You know, the
22 skills that --

23 THE COURT: I guess I'm having trouble with that.
24 If we're trying to figure out was he working for other people
25 while he was employed with the Defendant here, why are we

1 going way back?

2 MS. IDALSKI: Because, Your Honor, we don't trust
3 those dates. Okay. They go back and forth between --

4 THE COURT: Wait, no, no, I'm talking about -- he
5 worked for your company between 2010 and 2013 --

6 MS. IDALSKI: Yes.

7 THE COURT: -- so you would want to know was he
8 working at other places during that time --

9 MS. IDALSKI: Yes.

10 THE COURT: -- period.

11 MS. IDALSKI: Absolutely.

12 THE COURT: So why are you going way beyond that?

13 MS. IDALSKI: Because he's now contacting these same
14 companies for work, and who's to say when he was working at
15 TSS that he wasn't contacting those companies for work. Your
16 Honor, I don't like it --

17 THE COURT: Why can't you limit it to the dates --

18 MS. IDALSKI: We could.

19 THE COURT: -- when he worked --

20 MS. IDALSKI: We could do that.

21 THE COURT: -- for your --

22 MS. IDALSKI: We absolutely could do that.

23 THE COURT: Okay. Because that is one of the
24 complaints, that we're going --

25 MS. IDALSKI: Yeah.

1 THE COURT: -- way back.

2 MS. IDALSKI: We could -- no, we said we'll limit it
3 to the dates of the employment with TSS.

4 THE COURT: The employment records also, not just
5 the phone records, you would limit it.

6 MS. IDALSKI: Yes.

7 THE COURT: Okay. I mean because the way I read
8 it --

9 MS. IDALSKI: Well --

10 THE COURT: -- it was very --

11 MS. IDALSKI: -- you know --

12 THE COURT: -- broad.

13 MS. IDALSKI: -- well, Your Honor, we would like
14 the training records though, so with respect to questions such
15 as, you know, if there's any employment records between these
16 dates with respect to -- well, the question's going to be,
17 Provide any applications that were between these dates, right,
18 the relevant dates. But then we also --

19 THE COURT: And the relevant dates are going to be
20 when he was working for TSS.

21 MS. IDALSKI: That's right.

22 THE COURT: And then also we need the training
23 records. Okay. So we will need the training records during
24 the time that he was employed with these companies.

25 MR. MOULTON: Your Honor, if I may?

1 THE COURT: (No verbal response.)

2 MR. MOULTON: You know, if he's working at any of
3 those companies when he's working at TSS, and he's not, if he
4 were, those companies would have issued a 1099 or a W-2. And
5 we've offered to provide those to show -- and they would show,
6 if he ever worked with them during this period. We can go to
7 that --

8 THE COURT: But why can't we start there with 1099
9 and W-2s, and then if he was working there, then we'll
10 consider --

11 MS. IDALSKI: Your Honor, we -- they refused to
12 provide any -- the man hasn't provided tax records in 12
13 years. They haven't produced any 1099s --

14 THE COURT: He's the one --

15 MS. IDALSKI: -- or W-2s --

16 THE COURT: -- he's the one bringing it up, the
17 1099s and the W-2s, willing to provide them.

18 MS. IDALSKI: Your Honor, how do we know they're
19 providing us -- that his client is providing him with all of
20 the documents? He's lied so many times already. And again,
21 going back to this Gray Wolf, there's nothing in the
22 deposition -- Mr. Moulton is stating facts to the Court that
23 are not true, that he ever applied to this employer. He was
24 fired from that employer for failing a drug test. So we need
25 to stick to the facts here.

1 THE COURT: I'm just saying I think your request is
2 way broad --

3 MS. IDALSKI: Well --

4 THE COURT: -- overly broad.

5 MR. MOULTON: Okay. We'll narrow it then, Your
6 Honor, to --

7 MR. MOULTON: Your Honor, if I may?

8 MS. IDALSKI: -- to those --

9 MR. MOULTON: There's another way to find out about
10 the 1099 and W-2s that don't involve whether or not, you
11 know -- that don't even involve Mr. Lauterbach. We don't have
12 to rely on him. We can send, you know, a request to the IRS
13 for his W-2s and 1099s reported by any employer during these
14 dates. We can get that information, and I've offered that,
15 and they don't want that. They want everything under the sun.

16 MS. IDALSKI: That's not true, Your Honor.

17 MR. MOULTON: And the training records --

18 THE COURT: Okay. Why can't we go about it to look
19 at it that way. And if he, in fact, did work for these
20 employers while he was working for TSS, then I may allow, you
21 know, some further discovery from their files. But what I'm
22 hearing here is he's saying, I wasn't working there during
23 this time period. And you're saying, Well, we don't know if
24 he was or not because we can't trust what he says.

25 MS. IDALSKI: Exactly.

1 THE COURT: So why can't we go about it through a
2 release from the IRS returns?

3 MR. PIPITONE: Your Honor, he didn't -- he's not
4 filed taxes in the last 10 or 12 years.

5 THE COURT: But I thought I read somewhere that
6 he --

7 MR. MOULTON: Right. So --

8 THE COURT: -- was getting on track with that or --

9 MR. MOULTON: Right. So he has -- there's been two
10 times with this. He had several years and he, you know, he
11 went back and got -- you know, paid back those taxes and got
12 the release of lien. At this point now, for the last several
13 years, which includes this employment here, he has also not
14 filed. He's working with an accountant to file.

15 But the thing is, that would still only be what he
16 would provide. But employers have to send that information to
17 the IRS. The IRS has it, the IRS already knows what he was
18 paid.

19 THE COURT: Right. Why can't we do that?

20 MS. IDALSKI: Your Honor, this is really
21 restrictive. We can do that, but what about the training
22 records, what about the other --

23 THE COURT: Well, what if you -- oh, because you're
24 wanting training records that go way back --

25 MS. IDALSKI: Right. Right.

1 THE COURT: -- even if he wasn't there.

2 MS. IDALSKI: And applications as to when he
3 applied. If he applied but wasn't employed, we wouldn't get
4 that information from the IRS. We're looking for
5 applications, contacts where he's looking for a job, we're not
6 looking for disciplinary records per se. Okay. But these
7 things are very reasonable, Your Honor. We're in the
8 discovery stage, we're the Defendant, we have the right to
9 discover these things. It doesn't mean that they're coming
10 into any trial.

11 THE COURT: All right.

12 MR. MOULTON: Your Honor, if I may? On the
13 disciplinary records, I mean --

14 THE COURT: They're not looking for that.

15 MR. MOULTON: Okay. And then -- oh, the -- I'm
16 sorry, what I meant to say is the --

17 THE COURT: Training --

18 MR. MOULTON: -- training records. If he's a
19 skilled worker, if he -- you know, as a driller. Right? He
20 worked as a drilling for years or the floor handler, whatever,
21 that's not skilled. But if he worked -- if he had training
22 and skills that relate to that job, that's completely
23 different about the skills that are required to be a solids
24 control technician.

25 And that's the issue here. It's not just generally

1 whether or not he's skilled, it's whether or not with this
2 employer if it's -- there's two things, it's not -- you know,
3 when you look at skill there's two issues. It's not only the
4 skill required for that job, and this job is done by pizza
5 delivery boys, by the way, and guys who have experience, but
6 it's also the real sense to help you decide whether or not
7 he's in business for himself, as to whether or not he's using
8 his skill and initiative to obtain more work, to be in
9 business for himself, to get contracts. Right?

10 And so whether or not he has experience in the
11 oilfield from before and the training he received does not
12 tell us about the skills required to be a solids control
13 technician, because somebody can be, you know, a driller with
14 one company and then he can go sweep floors somewhere else.
15 Right? I mean the fact that they were --

16 THE COURT: Well, what was his job when he worked at
17 these different companies?

18 MR. MOULTON: He was -- he worked as a floor hand
19 initially, like everybody does in the oil industry. He's also
20 been a tool pusher and he's also been a driller. And tool
21 pusher and driller are, you know, are pretty big jobs. But
22 running the solids control centrifuge is a pretty simple job.

23 MS. IDALSKI: Your Honor, these are issues of
24 disputed fact, and this is the discovery stage and we're
25 entitled to know what his experience is, what his skills are,

1 and to match those to what we were -- to what our clients were
2 looking for for these technicians. He's arguing his case
3 right now. We're in the discovery stage, we're just asking
4 for training records, job descriptions and duties.

5 THE COURT: For the employment records, and I think
6 I'm going to allow them to direct, you're going to have to
7 limit your -- the scope of your request to the employer, but I
8 think we can do W-2s, 1099s for the time frames he worked for
9 TSS, and I'll allow you to ask for training records and
10 applications.

11 The applications I guess would be during that time
12 frame also, but the training records would cover how far back?

13 MS. IDALSKI: From the beginning of his employment,
14 whenever that is. But we'll put that in the request, from the
15 date of hire to the date of termination.

16 MR. MOULTON: Your Honor, I don't understand why the
17 applications are going to matter. I mean if you're working
18 somewhere and you are looking for other jobs at the time, it
19 says nothing about whether you're an employee or independent
20 contractor. People are always looking for work.

21 THE COURT: So what are you looking for in terms of
22 the applications?

23 MS. IDALSKI: Your Honor, that's exactly what we're
24 looking for, we want to know if he had the opportunity to make
25 a profit or suffer a loss during this time by taking on other

1 jobs, by applying for other jobs. Did he have that
2 opportunity. The case law is extremely clear and he hasn't
3 addressed the *Gate Guard* case at all, that whether or not
4 these individuals were allowed or had the opportunity to go
5 work for someone else during the time that they had breaks.
6 This would show -- this goes to the economic reality that goes
7 to profit and loss. So if he's contacting these other --

8 THE COURT: All right. I've limited it already to
9 those three areas.

10 MR. MOULTON: Well, Your Honor, on the *Gate Guard*
11 case, I'm just ignoring 5th Circuit precedent. You know, in
12 our most recent -- you know, in our reply about this, there's
13 specific cases that go back for decades now where additional
14 income on the side is not relevant. It doesn't change your
15 status. You can -- you know, take for example Mr. W Fireworks
16 stocks --

17 THE COURT: And it might not be, it may not come in
18 at trial, but she's --

19 MR. MOULTON: Right.

20 THE COURT: -- right and this is -- we're in the
21 discovery stages, so I think they're entitled to see what
22 might be there. But we need to address the phone records now,
23 which I think is extremely broad, your request, again.

24 MR. MOULTON: Well, so, you know --

25 MS. IDALSKI: Your Honor --

1 MR. MOULTON: -- anybody who's working anywhere,
2 who's going to call all kinds of people when they're off duty,
3 and they're going to get all that. They're going to get
4 every --

5 THE COURT: Yeah, I need to figure out how we're
6 going to limit this.

7 MR. MOULTON: Right.

8 THE COURT: And we'll let the Defendant see.

9 MS. IDALSKI: Okay. Your Honor --

10 MR. MOULTON: Well, Your Honor, if I may, I have
11 some suggestions on that.

12 MS. IDALSKI: Can I --

13 THE COURT: Let me see what she wants --

14 MR. MOULTON: Okay.

15 THE COURT: -- and then you --

16 Go ahead.

17 MS. IDALSKI: Your Honor, we agreed to limit it to
18 the dates of his employment, and that's what we're limiting it
19 to. I mean we want to know if he says he was working but yet
20 his phone records show he was somewhere else, in Florida or
21 some other state or some other area. Certainly we're going to
22 be looking at that, or if he's not where he says he is. He's
23 asking for a lot of money, he's saying he worked around the
24 clock.

25 These phone records, they're not time records, but

1 they're certainly going to test his credibility as to where he
2 is and it will lead to the discovery of admissible evidence.
3 We are not going to be skip tracing numbers and this -- all
4 these, you know, paranoia -- paranoid assertions that have no
5 basis. I mean it's a simple request for telephone records.

6 MR. PIPITONE: Your Honor, if I might just add one
7 thing. Mr. Moulton just said a moment, he said, If my client
8 is on the phone during the hours he's not working. Well, Your
9 Honor, in this case -- and I took Mr. Lauterbach's
10 deposition -- he's saying he worked -- at one point he worked
11 three days straight. He's saying he worked as much as a 100 a
12 week.

13 Well, if Mr. Moulton is correct, that these phone
14 records will show that he's on the phone during the hours he's
15 not working, that's exactly what we're looking for because
16 that will show then the hours he's not working and then from
17 that we can deduce the hours that he was working. That's why
18 they're relevant, Your Honor.

19 MR. MOULTON: Well, he's provided a chart, you know,
20 based on his estimate of when he's working, because we know,
21 based on the payroll records, the days that he's on the job.
22 And, you know, as TSS will tell you, they don't have set break
23 times, they don't have necessarily set hours. And so let's
24 say we're looking at his phone records and we see a call at
25 five o'clock to some random person. That doesn't tell us that

1 he was -- you know, it doesn't tell us that he wasn't working
2 then or that he wasn't on a break. It doesn't tell us about
3 the hours he worked.

4 And on average he's saying 12 hours a day. And
5 there were times when he was working two rigs at once, and
6 he's going back and forth between these two rigs. And if you
7 make a phone call while you're driving, that doesn't affect
8 the compensability of that time. If it's picking up a cell
9 phone tower 45 miles away, I mean that's not going to tell you
10 whether or not he, you know, was there or not.

11 So that's why we would propose limiting it to --
12 well, and the other issue that could be -- I admit could be
13 relevant on the phone calls between him and managers or
14 supervisors at Total Screen Solutions. We know those numbers,
15 we can limit it to those numbers. We can also limit it to, if
16 the location is farther than 45 miles away from the rig, or
17 his route, that would possibly indicate that he's not at the
18 rig or on the route and that could be relevant. Right.]

19 But if it's within some, you know, reasonable
20 distance of where he's supposed to be, for all we know he's
21 there. Right? We don't -- it's not going to tell us. What
22 it is going to do then is just give them, you know, everything
23 about him, every single call he's made for over three years to
24 anybody at any time.

25 THE COURT: How do you limit that?

1 MS. IDALSKI: Your Honor, I don't think there's a
2 way limit it. This is common discovery request, this is
3 discovery, it's likely to lead to the -- to admissible
4 evidence here. If there is something in there that, you know,
5 ultimately when we come to prove our case and we have to put
6 on our evidence, if he wants to keep it out of, he can keep it
7 out, but we're in the discovery stage. There's no way to
8 limit it any more than by dates. We can't limit it by
9 telephone number.

10 We're going to be looking at the times that he's on
11 the phone, the length of times that he's on the phone. We're
12 going to be looking at area codes, we're going to be looking
13 at dates. But I don't know how you limit telephone numbers.
14 We're certainly not interested in, you know, anything personal
15 or his personal life.

16 MR. MOULTON: The area codes aren't going to say
17 anything. It's a cell phone. The area code's just --

18 THE COURT: All right. The Court's going to deny
19 the motion to quash subpoenas regarding the phone records.
20 They'll be limited to the dates of his employment with TSS.
21 It's my understanding there's not going to be any texts
22 involved. Anything else on that issue?

23 MS. IDALSKI: Not on this issue, Your Honor, but we
24 do have the motion for conditional certification.

25 THE COURT: Okay. So let's proceed with the motion

1 for conditional certification, Mr. Moulton.

2 MR. MOULTON: Yes, Your Honor. So conditional
3 certification under FLSA is essential to its enforcement. You
4 know, Plaintiffs can proceed collectively, they're similarly
5 situated to collectively, you know, earn their overtime pay.
6 Similarly situated on, you know, traditional analysis that
7 most of the Courts look at is if, you know, if you're
8 performing similar job duties, if you are paid the same way,
9 if you are, you know, basically subject to the same sort of
10 policies. Right.

11 And that's exactly what we have here. We have one
12 category of worker, which is hand or solids control tech,
13 they're all paid a day rate, and they're all classified in the
14 same way. They work similar schedules, they are usually
15 assigned two sit hands to a rig and they each take a tower.
16 So, you know, you take a day tower or a night tower and it --
17 that corresponds to day hand, night hand.

18 And, you know, this is a classical situation for a
19 conditional certification treatment. You just have one group
20 of employees that are all employed by Total Screen Solutions
21 and have -- I'm sorry, the same policy, denied overtime under
22 the exact same policy.

23 There is not differences among them that are
24 material to the certification analysis. Courts that look at
25 whether or not the punitive class members are economically

1 dependent upon their employer, in other words, go to the
2 ultimate issue in the case, you know, the Courts have looked
3 at that and they said, No, we're not going to do that because
4 that's a merits-based inquiry. That's like trying to decide
5 the answer to the case at the stage of whether or not we're
6 going to send a notice out to the employees to let them know
7 if they can join the case.

8 And that's what conditional certification is. I
9 mean the Supreme Court's come out recently in the *Symczyk v*
10 *Genesis Healthcare*. It's not a class action, you know, we're
11 not asking to have this already binding on the entire class.
12 Instead it's conditional certification, which is a very
13 lenient and low standard.

14 And basically what it is, it just simply means
15 notice goes out to these people, they get a chance to know
16 about the case and they can have an opportunity to join on if
17 they like. If they join on, then the case proceeds
18 collectively through discovery and we find out more about the
19 case.

20 At the close of discovery then usually if the
21 employer feels the need, they can move for, you know, a
22 decertification to prove that they are, in fact, not similarly
23 situated. That's their right to do that. At that time, with
24 all the facts before the Court, then you're able to analyze
25 whether or not they are, in fact, similarly situated.

1 But right now we -- you know, discovery is in its
2 infancy, we have very little done. And, you know, usually
3 what Courts do, they just consider the pleadings and the
4 declarations on file from the Plaintiff. And those
5 declarations show that these guys are similar. Right?

6 They don't -- they're not exact, I mean some guys
7 may have had to work, you know, two rigs, or some guys may
8 have had to have a little stretch where they were on for 70
9 hours because there was, you know, something wrong with the
10 rig. But overwhelmingly it's 12 hours a day, classified the
11 same way as an independent contractor, paid overtime -- not
12 paid overtime.

13 Now the other thing that's interesting too is, a lot
14 of Courts have just looked at, well, if the employer can just
15 have a blanket classification, then the Court can analyze that
16 blanket classification. That's what we have here.

17 They've answered in discovery that Nick Mills made
18 the determination to, you know, make the solids control
19 technicians independent contractors without further analysis.
20 And so, you know, if he can do that, the company can make that
21 blanket classification based on what they know, then that's a
22 decision that we can also determine on a collective basis
23 whether or not it's actually valid or not.

24 So we think the -- that these employees are entitled
25 to know about this case and have an opportunity to join on if

1 they'd like. We already have -- you know, at this point we've
2 had I think 11 people join on. Aaron Hansen is withdrawing,
3 so we're at 10.

4 THE COURT: All right.

5 MS. IDALSKI: Your Honor, we've got a couple of
6 exhibits to show you. This is the total of what goes out
7 in --

8 MR. PIPITONE: Your Honor, where would be the best
9 place for you to see these? I know in your courtroom you have
10 an easel, but we don't have one here.

11 THE COURT: Right.

12 Brandy --

13 MR. PIPITONE: I can put them on a chair or
14 something like that and take and pop them off?

15 THE COURT: That's fine. Probably --

16 MR. PIPITONE: Maybe the jury box?

17 THE COURT: -- probably right here. Yes, that'll
18 be fine.

19 (Pause in proceedings.)

20 MR. PIPITONE: Your Honor, is that visible to you?

21 THE COURT: Uh-huh. That's good. Yeah, that's
22 fine.

23 MS. IDALSKI: It might be easier, Judge, if we turn
24 it?

25 THE COURT: That's fine.

1 MS. IDALSKI: Your Honor, we have some real
2 concerns, and Mr. Moulton's right, usually Courts just sort of
3 rubber stamp collective actions at the very early stages and
4 grant conditional certification and go forward and then
5 eventually decertify it.

6 But this is not one of those cases. And here is --
7 we're all in this together. We need to figure out whether or
8 not this is going to benefit the judicial system, whether it's
9 going to benefit the parties to all proceed at the same time.
10 And it's completely up to the Court. The Court has complete
11 discretion to do whatever the Court wants to do.

12 Plaintiff does bear the burden. Based on what he's
13 just stated and based on his papers, he's not proven that
14 these individuals are similarly situated. And he can't. And
15 the reason why he can't is because, number one, it's hard to
16 do so in an independent contractor case because the standards
17 are different. But it's not just that this is an independent
18 contractor case. It's that we don't have any common
19 supervisors, we don't have a plan, we don't have a policy, we
20 don't have control.

21 We've got these sit hands who are out there on these
22 rigs and they are reporting to these various company men. And
23 the company men set their hours, tell them when they can move,
24 tell them what to do. All of them are with different
25 companies, these companies are our clients, some of them are

1 not with our clients, some of them are independent contractors
2 and they're hired by other companies to come in to let's say
3 Marathon and be the company man.

4 So what we have here is we've got potentially in
5 this class, and I'm being very conservative with my numbers,
6 50 sit hands. We have James Lauterbach testifying, or
7 producing paperwork that he reported to, based on his ticket
8 reports, about nine company men in the course of a year. We
9 have Brandon Nees (phonetic) in his declaration submitted with
10 the Court -- to the Court with our motion that he reported to
11 11 company men.

12 All telling them to do different things, all having
13 them do -- work different hours. Some of them are working
14 backhoe, some of them are not, some of them are -- they're all
15 doing different job duties. Some are allowed to go in the --
16 to leave and go home, some have to stay there. They all had
17 different working conditions.

18 So where does this leave us? This leaves us with
19 our having to track down potentially 500 company men, and this
20 is the exact reason why Courts do not grant conditional
21 certification. And we're not in a position right now where --
22 we're at the leniency stage where this just got filed and we
23 don't know anything. We've been at this for nine months.

24 And this is -- believe or not, some of these
25 individuals out there really are -- I know it's hard to

1 Mr. Moulton to believe that, but they really are independent
2 contractors and that's how it's structured. So we are going
3 to have -- if this is conditionally certified, and one of the
4 factors we have to prove is control, it is going to be a mess
5 because we don't know who these company men are. We know them
6 on the service sheets as, you know, Pee Wee and Bubba and Two
7 Tom and Tee Wee, we have first names. Our clients don't
8 necessarily know who they are because they're independent
9 contractors of the client's.

10 Now in the *Fabato* (phonetic) case, which you had --
11 which you may still have before you, but you had before you at
12 one time and wrote the decision, that case was conditionally
13 certified, and like this one there were site hands or closed-
14 loop operators, but in that case they all reported to the same
15 supervisors. They all had the same policy, they all had the
16 same plan, they all had the same working conditions.

17 So in collective -- in independent contractor cases,
18 the standard is different, and I just want to read this quote
19 from both a Supreme Court case and it's an Eastern District of
20 Pennsylvania case which Judge Rainey relied on in the *Andel*
21 (phonetic) case, which is almost -- it's not the *Gate Guard*
22 case, it's called the *Andel* case, which is like this one.

23 But when analyzing -- when a Court analyzes a motion
24 for conditional certification of a collective action based on
25 allegations of independent contractor misclassification, the

1 Court,

2 "Must analyze whether the punitive collective action
3 numbers are similarly situated with respect to the
4 analysis it would engage in to determine whether the
5 workers are employees or independent contractors."

6 And this is *Bam Boss v Delta T Group* (phonetic),
7 it's an Eastern District of Pennsylvania case, 2010, cited in
8 our brief.

9 Quote, and this is a Supreme Court case, *Hoffman v*
10 *LaRosa*,

11 "The Court cannot look to Defendants uniform
12 classification of workers" --

13 Okay. Like Mr. Moulton wants you to, that they're
14 all sit hands, or it's common payment procedures, that they're
15 all just getting a day rate. Instead, it must determine
16 whether the proof to demonstrate that the workers are
17 employees or independent contractors can be applied to the
18 case as a whole.

19 We don't have to prove these five elements right
20 now. No one has to do that. But the Court has to look at,
21 gee, am I going to be able to look at the control factor and
22 is it going to -- do we have common policy that's going to
23 apply to all these people, or am I going to have to look at
24 this on an individual basis. And right now we've got 10
25 people that want to opt in, or eight, two are in, one is out,

1 and there's potentially 50 more with all of these additional
2 company men.

3 So this is the same situation that Judge Rainey was
4 faced with in the *Andel* case. He was dealing with welders.
5 And he didn't conditionally -- it was a magistrate judge
6 initially that said, No, we're not going to conditionally
7 certify this, and then Judge Rainey affirmed it. And the
8 reason was because the Court said the number of hours each day
9 and each week varied significantly. Okay. And we already
10 have evidence, based on Mr. Lauterbach's deposition, that he
11 worked 12.5 hour daily shifts and that during the last year of
12 his employment he worked as many as 70 in a straight week.

13 On the other hand, sit hand George Shanefelter
14 (phonetic) works his hours out with the sit hands and he works
15 six hours. Sit hand Brandon Nees testified that 50 percent of
16 the time he's working six hours, the other 50 percent of the
17 time he leaves and does other things, it just depends on what
18 the company man wants us to do. And we work the whole shift
19 or we don't. Sometimes we only work for the first three days,
20 depending upon what the company man wants.

21 So if you look at the declarations, which are
22 already in evidence, and you look at Mr. Lauterbach's
23 deposition testimony, they are reporting to these company men,
24 and the company men are setting the working conditions. So
25 they can't be -- they absolutely cannot be similarly situated

1 in this case.

2 If we had a common supervisor who was setting hours
3 and duties and other requirements, we might be able to do
4 that. But we can't. And that's the issue. We even got
5 Plaintiff Lauterbach testifying in his deposition that he
6 reports to the company man.

7 And page 240 to 241,

8 "Question: Well, I notice on your service reports that
9 they all have 'check in with the company man'. Is that
10 somebody that you would report to?

11 "Answer: Yes, I would check with him. We dealt with the
12 company man because he would get a MUD report on what the
13 solids were and just check with him, you know, see if
14 there was anything he thought I needed to give attention
15 to with our equipment, see what the solids were, if there
16 was anything I needed to do, needed to change as far as
17 the way we were running our machines, stuff like that."

18 Page 250 in Mr. -- Plaintiff Lauterbach's
19 deposition,

20 "Question: Okay. Once you figured out the job,
21 especially because of the all the experience you had from
22 the drilling site, your contact back to Total Screen
23 Solutions became minimal, didn't it?

24 "Yes."

25 Page 244,

1 "And so what they're telling you is, Mr. Lauterbach,
2 you're working out there for these people. You've got to
3 check in with the company man for instructions. Right?

4 "Answer: Yes."

5 Page 246,

6 "Question: Were there ever times when you were out on
7 the rig and you would actually leave the rig during the
8 time you were assigned to work.

9 "Answer: If they were idle and the company man needed
10 something from town, and I needed something from town, I
11 would check with the company man, like I was told to do,
12 you know, and if we were going to leave, just get with
13 the company man, and I'd pick him up something, or he'd
14 pick me up something."

15 Lauterbach submitted service logs and reports to the
16 company man, page 257. Now Mr. -- or Plaintiff Lauterbach
17 wants to say, Well, I actually reported to Don Holloman
18 (phonetic), and he was one of the service tech supervisors.
19 But in his deposition he said, on page 270, that Don Holloman
20 only came to the job site once or twice a month.

21 Page 305,

22 "Question: If you didn't have a problem, was there any
23 requirement to report it to Don?

24 "Answer: No, I normally didn't call him unless I had a
25 question about the machines."

1 After about six months on the job, Don told him to
2 stop sending daily service reports to TSS, page 257. So what
3 we have here is we don't have anyone at TSS telling these
4 individuals what to do. They are not similarly situated.
5 Yes, they are sit hands, yes, they are paid a day rate, and,
6 yes, they go out to oil rigs that are clients' of TSS.

7 But the Plaintiff has not proven at this stage that
8 these individuals are similarly situated, and if we proceed
9 with a collective action at this point, we are going to have
10 to track down -- and I don't even know if it's possible -- all
11 of these company men to find out what -- to prove that all of
12 these people were doing different things.

13 We already know right now that they were doing
14 different things and they reported to different -- all of
15 these different people based on the Plaintiff -- Plaintiff's
16 deposition and based on the declarations of three, four and
17 five of the sit hands. So this is not the lenient stage.

18 We are well past that. We are nine months into
19 that. The Court, at this point, doesn't -- even with the
20 Lusardy approach, we don't need to go down that road, we don't
21 need to have a certain amount of discovery. There's cases
22 after three months of discovery, applying this approach is
23 reasonable.

24 And again, the case that I cited with respect to
25 Judge Rainey is *Andel v Patterson, UTI Drilling Company,*

1 Southern District of Texas, February 15, 2012. And the reason
2 it was not certified is because the number of hours worked
3 each week varied, the number of hours each day varied, the
4 pattern of days on and off varied, the pattern of invoice
5 submission varied, and the length of time each Plaintiff
6 worked for the Defendant varied significantly.

7 We have the exact same situation here, and we're
8 really concerned, Your Honor, that if this gets conditionally
9 certified, it's going to be a mess because we're going to have
10 to look at each individual person and determine whether or not
11 that person's an employee or an independent contractor based
12 on all of these factors, namely whether -- how these company
13 men treated them.

14 THE COURT: All right.

15 MR. MOULTON: Your Honor, if I may approach?

16 THE COURT: Yes.

17 MR. MOULTON: The situation that we have here with,
18 you know, these Plaintiffs being assigned to different
19 locations is extremely common. This happens all the time.
20 You'll see it with the janitorial industry, you'll see it in
21 the farming industry, you'll see it in welding industries.
22 And these are all cases where they're classified as
23 independent contractors. And what the Courts have realized is
24 that you don't have to have direct control for them to be your
25 employees. You don't have to be supervising them every day.

1 You know, the *Antenna/Farms* comes to mind, *Antenna v*
2 *CNS Farms*, 11th Circuit. You don't have to -- see, under the
3 very traditional principles of employment law, under agency or
4 control factors, you know, that's the traditional standard,
5 but the Fair Labor Standards Act is meant to be extremely
6 broad, and it has, it's the broadest definition of employee
7 that there is. And it's meant to get employers who don't
8 directly control their employees. And Courts routinely grant
9 conditional certifications in cases like this.

10 Because the reason is, is that we're not talking
11 about our guys' relationship with the company men, whether or
12 not they're employees of the company man. What we're
13 challenging is whether or not the control that does exist,
14 though not exactly the same, is from the company men. The
15 control from TSS, whether they're similarly situated in that
16 regard, and they are under either one of our -- if you take
17 their point of view or you take our point of view.

18 If you take TSS's point of view that there's
19 absolutely no control, we can decide on a collective basis
20 whether or not there is any control. If you take our side
21 that they control their pay, that they control, you know,
22 whether or not they're day or night, which basically
23 determines their hours, the 6:00 a.m. to 6:00 p.m., and then
24 6:00 p.m. to 6:00 a.m., you know, it's two different shifts,
25 whether or not there are policies whether they can hire other

1 workers to work for them, whether or not they have to provide
2 those services on their own, whether or not they're subject to
3 TSS's policies about how to care for and service the equipment
4 in the duties that they're doing.

5 And all our guys have testified unanimously on these
6 issues that there is a level of control with TSS and that they
7 are similar with regard to TSS. And so it -- I understand
8 Defendants' position that, you know, these guys, you know, are
9 on a rig and on a client location like that, the guys -- you
10 know, the company men are in charge of that location, but
11 they're still subject to a level of control from TSS. And
12 what we're challenging is that classification, not whether or
13 not they are also employees of the drilling company.

14 Now all the other factors -- that's just one, right,
15 and, you know, you look at -- the Court's saying, Well, you've
16 got to look at the economic reality of the situation to see,
17 you know, how important each factor is. Obviously in
18 situations in industries where you're being assigned to other
19 locations, which is extremely common, the direct supervision
20 is not as a relevant.

21 This case is not *Andel*. I don't even understand why
22 a -- what the Court means by a -- the *Andel* Court meant by a
23 different pattern of invoice submissions, but what I'm
24 assuming is that it was just -- that it must have been just a
25 jumbled mess of when people worked and they just turned in

1 time whenever.

2 That's not the case here. They turn in their time
3 sheets every 15th and 30th, or 31st as the case may be, and on
4 each of those time sheets they show exactly the days they
5 worked and the day rate. These day rates don't change,
6 they -- you know, they're not bidding each time like a true
7 independent contractor would.

8 They're not providing the -- there's no opportunity
9 for profit or loss if you don't have a control over your day
10 rate, and you don't pay for the expenses. Total Screen
11 Solutions provides centrifuges and the dry shaker screens and
12 tanks. I mean this is huge capital investment that TSS has to
13 provide, and our guys don't provide any of that. Our guys
14 don't even provide the wrenches and the specialized tools that
15 they have to use on the centrifuges. That's all provided by
16 the company. And the company provides their coveralls, and
17 they provide pens.

18 And so they're similarly situated with all these
19 factors. I mean permanency. Right? That's another one that
20 hasn't been discussed. These guys have worked for TSS for
21 years. James Lauterbach worked for over three years with TSS,
22 he didn't work anywhere else.

23 If you look at the number of days he worked, that's
24 1031 day pay period and he's detailed this on the record with
25 his spreadsheet. There's only about 200 days that he didn't

1 work for Total Screen Solutions out of 1031. And an employee
2 who worked Monday through Friday would have had 320 days off.
3 So he's working a lot more than even full-time employees, as
4 far as just the number of days that he worked. That's a
5 permanent relationship.

6 You know, the guys in, you know, the 5th Circuit
7 case, they talk about -- this is real interesting -- you look
8 at the Mr. W Fireworks stand operators, right, there's two
9 things really interesting about that case. They were
10 employees, they work two short seasons. They worked a 13-day
11 season for Christmas and New Year's and they worked an 11-day
12 season July 4. The rest of the year they're not working for
13 Mr. W, have nothing to do with Mr. W. They're working other
14 jobs. But because they're employed for that entire season,
15 for that time period, they're permanent in regards to that.

16 Now *Baker v Flint Engineering* is another interesting
17 one about -- out of the 10th Circuit. In that case you got
18 oilfield workers and because they work from rig up to rig
19 down, they're considered to be permanent because that's the --
20 that's their -- in reality that's the work cycle for these
21 guys. And that's what we have here. Welders are on the same
22 sort of analysis.

23 There's a case that just came out against Patterson,
24 motion for summary judgment granted in favor of Plaintiff
25 welders against Patterson UTI in the Eastern District of Texas

1 on January 30, and in that case there's gaps between the rig
2 times, just like there is here, and they're still permanent
3 employees because they come right back on at the same rate
4 under the -- in the exact same way. They get assigned through
5 the company that's -- well, they're actually working directly
6 with Patterson, but they -- even though there's gaps, it
7 doesn't take away from that because they come back at the same
8 rate.

9 And that's what these guys do. If they get a
10 raise -- you know, most of them pay about 250, if they get a
11 raise, that raise sticks from rig to rig until they get a
12 raise from TSS. I mean that's a level of control that doesn't
13 have anything to do with the company man. Company men don't
14 determine their raises or what they're paid, or have anything
15 to do with the equipment because that's all provided and
16 controlled by Total Screen Solutions.

17 So, you know, this case is like many, many, many
18 other FLSA cases where you have a situation where the workers
19 on assigned off site. That does not mean that we have to go
20 through analysis of what every single worker had as far as his
21 relationship with the client location and the people there,
22 because we're not challenging that at this time.

23 We're not going after the company men, we're trying
24 to determine whether or not they're similarly situated and
25 their control and permanency and all the other factors with

1 one entity, which is Total Screen Solutions. Now the
2 Defendant has these declarations from what I call happy
3 campers. They're hand-picked from the Defendant, have
4 admitted they have an interest in continuing with Total Screen
5 Solutions and getting jobs with them. And so, you know,
6 Court's have found in situations like that that the employee's
7 testimony is unreliable.

8 These same guys that testified for TSS admit of
9 basically working a fraud on Total Screen Solutions. They
10 say, you know, we would not tell Total Screen Solutions and
11 one of us would go home while one, you know, and still get
12 paid like we were still at the rig site without telling them,
13 and the other one would cover for -- you know, the other
14 worker would cover.

15 You know, if you're going to deny conditional
16 certification, you know, if you were based on that testimony
17 on guys who are admitting to a fraud on TSS, who also are
18 saying that they're not working for TSS anymore and that
19 presumably must be why, in other words there maybe is a policy
20 that they're not allowed to do that, and that they want to get
21 work with them again. So they have an interest in saying
22 whatever TSS wants them to say. So, you know, I don't think
23 that they're -- the testimony of the -- of TSS's witnesses is
24 persuasive.

25 And what we need to look at is whether or not these

1 guys are similarly situated with TSS, not with some other
2 company. You know, they all have different relationships at
3 home or different relationships with any other companies that
4 they may be trying to get employment with after -- or just
5 looking for a better deal. Right? And those relationships
6 don't matter. What matters is the relationship with Total
7 Screen Solutions, is whether or not Total Screen Solutions is
8 providing enough control or not.

9 MS. IDALSKI: Your Honor, if I could one thing?

10 THE COURT: Uh-huh.

11 MS. IDALSKI: The Plaintiff has not provided you
12 with a single case where conditional certification was granted
13 where there were not common supervisors. This case is not
14 like every other case out there. This case is different, this
15 case is like *Andel*, like the case that we just talked about
16 with respect to Judge Rainey. There is not a case out there
17 that has been conditionally certified where there are not
18 common supervisors.

19 MR. MOULTON: Your Honor, if I may, that's not
20 right. I mean there --

21 MS. IDALSKI: Then cite one please.

22 MR. MOULTON: I can provide many more, I'll give you
23 two right now. *Prejean v O'Brien's Management Company*. Also
24 *Lima v International Catastrophe*. Those are cases that are --
25 they're basically these, you know, catastrophic, you know,

1 events like storms and things like that where people are going
2 out to work. And if it's not -- if *Lima* -- and there's other
3 ones out of the Eastern District of Louisiana as well where
4 there's -- you know, they talk about a thousand different
5 contractors that these guys all work for, they're manual
6 laborers.

7 And they're conditionally certified because we're
8 looking at the relationship with the company that referred
9 them out. In *Prejean* -- I'm the main attorney in that case --
10 our guys --

11 THE COURT: I thought that was cited in here
12 somewhere.

13 MR. MOULTON: It is.

14 MS. IDALSKI: It is cited --

15 THE COURT: Okay.

16 MS. IDALSKI: -- Your Honor, and actually on page 6
17 of that case it specifically states that the superiors were
18 also hired by the O'Briens. So you have common management in
19 that case as well. I went through -- I've gone through every
20 one of his cases and highlighted where there were common
21 supervisors, and I've got them all highlighted here.

22 There's *Prejean*, there's *Putnam* and there's *Prater*
23 and in each one of those cases they all worked under the
24 control and direction of a single person, Dillick (phonetic),
25 that's *Prater*; worked under the direction and control of those

1 hired by the O'Briens, that's *Prejean*. *Putnam*, the fact that
2 the area managers across different locations may have
3 different management, blah, blah, blah, they all worked --
4 they were all managers -- they all were the same managers that
5 these individuals were reporting to.

6 We've got a major issue here, Your Honor, with this.
7 And Plaintiff is going on and on, but he's not providing the
8 Court with any specifics or with any evidence with respect to
9 this issue. We're talking about the control factor. That's a
10 very important factor in this test. We're not talking about
11 all these other factors.

12 Someone -- there has to be a common policy, plan,
13 they have to be similar in independent contractor cases with
14 respect to how these individuals are controlled. And if there
15 is no control, then there's not going to be any independent
16 contractors.

17 But at this point in time we don't have a common
18 theme here with respect to that. I have not seen a case, and
19 I've looked hard for one, where there was not a common --
20 common supervisors, common management, or common control and a
21 case has been conditionally certified. You know, we don't
22 necessarily -- you know, we need to look at this. This is
23 something that's important to all of us.

24 We don't want to have to make -- we might as well
25 have separate cases if we're going to have individualized sort

1 of analyses. And that's what we're going to have to do here.
2 So this is a big problem.

3 MR. MOULTON: Your Honor, if I may, that's just not
4 right. I mean there -- and I'm happy -- if the Court needs
5 more cases on this, I will get it. But it is very common to
6 be -- you know, in these situations where you send out to
7 multiple client locations, you still get conditional
8 certification.

9 THE COURT: But that's not what she's talking about.

10 MS. IDALSKI: But there's a common manager or
11 supervisor.

12 MR. MOULTON: Well, no, but there's not. I mean,
13 and I believe it is the *Lima* case, and there's a thousand
14 different contractors, and that was the argument, that they're
15 subject to these different contractors, you know, they're
16 working for their policies. And maybe there is some
17 difference there, but we're not challenging how they different
18 with respect to the clients that they're assigned to.

19 We're challenging whether or not the control that
20 is -- that there is present, or is not, either way with TSS,
21 whether or not it's enough to be an employer under the FLSA,
22 with respect to TSS. Now if you're on location and the
23 company man is telling you things to do, right, and, you know,
24 some rigs they tell them to, you know, use the backhoe, or
25 not, fine.

1 But the other control factors about pay and about
2 where to work and, you know, the hours that they're going to
3 be working, who you're assigned to, whether or not you can
4 have workers, whether or not you have to do it all by yourself
5 or, you know, do it -- I mean personally the services, or you
6 can hire other people on your staff.

7 Those types of control factors that you're going to
8 see with the company that refers, we can look at that on a
9 class basis, and then the Court can determine at the end when
10 we have all the evidence whether or not they're similarly
11 situated in a control factor with Total Screen Solutions.

12 THE COURT: All right. I need to look at some
13 matters that were raised today in a little more detail. So I
14 suggest -- I'm tied up in a conference pretty much the rest of
15 the week, either maybe getting on either a phone conference or
16 you all can appear for a hearing that follow week, or early
17 the next one, Brandy. So we can just go ahead and finalize
18 this issue on the conditional certification.

19 (Pause in proceedings.)

20 THE COURT: Are you all available on April 1 at
21 10:00 a.m.?

22 MS. IDALSKI: Yes, Your Honor.

23 MR. PIPITONE: Yes, Your Honor.

24 THE COURT: Okay. Shall we reconvene then --

25 MR. MOULTON: Yes.

1 THE COURT: -- to finalize the conditional
2 certification issue?

3 MR. MOULTON: Sure.

4 THE COURT: All right. Thank you.

5 MS. IDALSKI: Thank you, Your Honor.

6 MR. MOULTON: I'm sorry, Judge, did you say
7 10:00 a.m.?

8 THE COURT: 10:00 a.m.

9 MR. MOULTON: Yeah. Okay. Thank you.

10 THE COURT: Okay. And if there's nothing further on
11 this case, then you're excused.

12 MR. PIPITONE: Thank you, Your Honor.

13 MR. MOULTON: Thank you, Your Honor.

14 (Proceedings adjourned at 10:09 a.m.)

15 * * * * *

16 *I certify that the foregoing is a correct transcript*
17 *to the best of my ability from the electronic sound recording*
18 *of the proceedings in the above-entitled matter.*

19 /S./ MARY D. HENRY

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